SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1941.

JOHN P. NICK and CLYDE A. WESTON,
Petitioners,
vs.
UNITED STATES OF AMERICA,
Respondent.
No. 712.

BRIEF IN SUPPORT OF PETITION FOR LEAVE TO FILE A SECOND PETITION FOR REHEARING OF APPLICATION FOR WRIT OF CERTIORARI.

This Court's Decision in United States v. Local 807 Shows That Eighth Circuit Court Decision in Nick v. U. S. Is Erroneous.

Petitioners respectfully invite the Court's attention to its decision in the case of United States v. Local 807, 62 S. Ct. 642, 86 L. Ed. 574, decided March 2, 1942, and respectfully suggest the similarity of the issues raised in petitioners' application for writ of certiorari.

The petitioners' indictment, conviction and imprisonment grew out of the negotiations for the 1937 wage contract (see executed contract, Tr. 277-287) between peti-

tioners, representing Local Union No. 143, International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators, and a committee representing motion picture owners. It was alleged in the indictment (Tr. 14-24) (first five counts) that petitioners made high and unreasonable demands for wages, but relented and signed a contract for lower rates of wages than originally demanded, when paid off by the theatre owners.

The Government's theory was that a strike by the moving picture operators in St. Louis would interfere with interstate commerce because films are made in California and shipped throughout the states; that the petitioners impliedly threatened to call a strike of the moving picture machine operators unless their demands were met. There was no proof of an express threat to strike, and from an evidentiary standpoint the case turned on what the members of the committee said to each other after leaving the presence of the petitioners (Tr. 261-263; R. 345-347, 359). The Court will therefore readily observe that the petitioners were not only negotiating for the payment of wages for members of a labor union (in which respect this case is similar to United States v. Local 807 case), but also that the petitioners were representing a labor union, and, under the proviso in Section 6 of the Anti-Racketeering Act, were carrying out the legitimate objectives of a bona fide labor organization.

The long union record of petitioners (more than thirty years) brings them squarely under the protection of the Act as being exempt from prosecution. The record is devoid of scintilla of evidence showing either petitioner to be a criminal.

The Eighth Circuit Court of Appeals' decision in this case does not withstand the tests set forth in United States v. Local 807 by this Court.

Comparison of Decisions.

Nick v. United States, 122 F. 660, l. c. 671:	United States v. Local 807, 62 S. Ct. 642, l. c. 646, 86 L. Ed. 574:
"It is to show the state of mind of Kaimann produced by the transaction and that his conclusion was communicated to other members of the committee. Whether Kaimann was justified in reaching such conclusion is an entirely different matter. Whether justified or not, that was the conclusion which he stated and which, undoubtedly, had its effect upon the minds and the future actions of the members of the committee in making this payment."	"We take this to mean that the intent of the owners in making the payment is to be regarded as controlling. We cannot agree. The state of mind of the truck owners cannot be decisive of the guilt of these defendants.
L. c. 673-674:	
"The fourth item (assignment 30) is aimed at a statement by the Court to the effect that if appellants had in mind two purposes in extorting the money—one to enrich themselves and the other to gain proper wages for the members of the union — the fact that one purpose was unlawful under the Act would justify conviction. Much is made that	"But it is always an open question whether the employers' capitulation to the demands of the union is prompted by desire to obtain services or to avoid further injury or both. To make a fine or prison sentence for the union and its members contingent upon a finding by the jury that one motive or another demonstrated the employers' decision would

such a view is in the teeth of the prohibition in the Act (Section 420d), the argument being 'that no court of the United States shall construe or apply any of the provisions' of the Act 'in such manner as to impair, diminish or in any manner affect the rights of bona fide labor organizations in lawfully carrying out the legitimate objects thereof, as such rights are expressed in existing statutes of the United States.' It seems to us an astonishing proposition that labor racketeers can coerce employers or anybody else to give them personal bribes in connection with wage negotiations and then escape punishment under this Act if any benefit in wages is obtained in those negotiations. Obviously, the only purpose or possible reason for employers bribing such racketeers in connection with wage negotiations is to secure lower wages than honest negotiations would probably produce. How such a situation could possibly result in anything but harm to the innocent members of the labor organization is not be a distortion of the legislative purpose."

L. c. 649:

"These instructions embody the rule for which the Government contends, and which we think is erroneous for the reasons we have given. Under them the jury was free to return a verdict of guilty if it found that the motive of the owners in making the payments was to prevent further damage and injury rather than to secure the services of the defendants. Whether or not the defendants were guilty of conspiracy thus became contingent upon the purposes of others and not upon their own aims and objectives. Moreover, the charge failed correctly to explain the legal consequences of proof that the owners had rejected bona fide offers by the defendants to perform the services. As we have said, the jury was bound to acquit the defendants if it found that their objective and purpose was to obtain by the use or threat of violence the chance to work for the money but to accept the

clear. It must be true that such innocent members are best served by representatives who honestly try to procure the best wages possible and who have no dividid, much less bribed, allegiance in such negotiations."

money even if the employers refused to permit them to work."

There is a direct and irreconcilable conflict in these decisions. We submit that the decision of this Court in United States v. Local 807 correctly states the intention of Congress to exempt labor, while the Eighth Circuit Court's decision in Nick v. United States overrides the intention of Congress by dicta which condemns the ethics of labor's representatives, but winks at the morals of unscrupulous employers who force labor to resort to threats and violence in order to gain labor's objectives.

The Court is urged to read the trial court's charge at Tr. p. 841, and note the method devised to by-pass the exemptions contained in the act. The example given there is wholly inapplicable and misleading because it eliminates from consideration the exemption as to wages and the proviso in section 6 exempting labor unions.

Counts 6 to 10, inclusive, of the indictment (R. pp. 40-43) are untenable under any theory. They simply allege that the petitioners forced the Theatre Owners to take sound service which the testimony shows was good service at cheaper rates than charged by their competitors (Tr. p. 552).

No Interstate Commerce Was Shown in This Case.

The petitioners' case should be reviewed by this Honorable Court, not only because its decision in United States v. Local 807 conclusively demonstrates that labor officials

may not be prosecuted under the anti-racketeering act when seeking wages or other legitimate objectives of a bona fide labor union, but also to determine whether petitioners' acts in any way interfered with interstate commerce. In other words, does an implied threat to call a strike of the men who operate the moving picture machines which run the films locally, interfere at all with interstate commerce? The interference with interstate commerce in the case of United States v. Local 807 was direct and immediate, because the over-the-road, interstate-bound trucks were stopped. Here no act of any kind was committed against anything which was moving in interstate commerce.

The Law Requires Two Separate and Independent Acts.

The grammar of the anti-racketeering act was not construed by this Court in United States v. Local 807, probably because it was not questioned. However, the real meaning of the phraseology should, in petitioners' opinion, be construed by this Court. The act reads as follows:

> "Any person who, in connection with or in relation to any act in any way or in any degree affecting trade or commerce or any article or commodity moving or about to move in the trade or commerce—
>
> (a) Obtains or attempts to obtain, by the use of or attempt to use or threat to use force, violence, or coercion, the payment of money or other valuable considerations, or the purchase or rental of property or protective services, not including, however, the payment of wages by a bona fide employer to a bona fide employee; or
>
> (b) Obtains the property of another, with his consent, induced by wrongful use of force or fear, or under color of official right; or
>
> (c) Commits or threatens to commit an act of physical violence or physical injury to a person or

property in furtherance of a plan or purpose to violate subsections (a) or (b); or

(d) Conspires or acts concertedly with any other person or persons to commit any of the foregoing acts; shall, upon conviction thereof, be guilty of a felony and shall be punished by imprisonment from one to ten years, or by a fine of $10,000 or both."

Boiled down it means.

One who, **in connection with any act** affecting commerce,

(a) Obtains by force * * * money * * * not wages from employer to employee; or,

(b) Obtains property of another with his consent, induced by force or fear under color of official right; or

(c) Commits or threatens physical violence or injury to person or property, furthering plan to violate sections (a) or (b); or

(d) Conspires with others to commit any of the foregoing acts; shall be convicted, etc., etc.

The words, "in connection with or in relation to any act" certainly mean an **actual act** (something done), not something **intended** to be done in the future, not something which **may or might be** done, not something **thought of.** While the law prohibits and punishes for criminal offenses **acts done** and **even some attempted,** never has the law made one guilty for violation of law **thought of,** or even **intended.** There must be an **overt** act **committed.**

In the case at hand, to convict under paragraph (a) the Government was under duty to show that defendants **"obtained * * * by force * * * money, etc.,** IN CONNECTION **with an act affecting commerce";** and that the defendants did not represent a bona fide labor organization and that they did not negotiate a wage contract for hours and wages for members of Local 143. That is to

say, there must be a separate **act**, actually done, **affecting commerce**, other than and apart from the **"obtaining * * * by force * * * money, etc."** The first paragraph of the law says, in effect (1), one who **"in connection with * * * an act affecting commerce,"** and paragraph two, lettered (a), says, **"obtains * * * money, etc. * * *."**

The same analysis applies, of course, to each lettered section or paragraph of the law, that is, paragraphs (a), (b), (c) and (d).

These words "any act" must refer to some act interfering with interstate commerce, and such act must be independent of and a necessary prerequisite of the acts of violence, coercion, etc., enumerated in sections a, b, c and d of the act.

There must first be an act affecting trade and commerce. This act must be followed by an act of, or threat to use, force, violence, coercion, etc. In short, it is the act described in line one which operates against trade and commerce. The use of the comma after the word "who," in the first line, has the effect of suspending or opening a gap in the sentence construction in order to permit the insertion of the clauses in a, b, c and d, but once these clauses are inserted, they are necessarily modified and restricted by the words "in connection with or in relation to any act," and the word "act" is likewise modified by the phrase "any way or in any degree." The Government adopted this construction of the act in drawing the indictment and in its argument against the demurrer to the indictment, but failing to prove any act of interference with interstate commerce, it abandoned the theory of the indictment and contended, in the argument of the demurrer to the evidence, that the alleged receiving of money was the gist of the statute, if a threat of any kind could be implied.

Nowhere in all the evidence in this case can it be shown that any act by defendants, or anyone else, did in any wise

actually affect commerce, or in any manner burdened commerce.

Petitioners respectfully inform the Court that they are now serving terms in penal institutions of the United States for convictions under the Anti-racketeering act, which has been partially interpreted by this Honorable Court since petitioners entered prison, in a manner which leads petitioners to believe that their imprisonment is contrary to law.

CONCLUSION.

Wherefore, petitioners pray that the Court grant the filing of petitioners' second petition for rehearing of the application for writ of certiorari and order writ of certiorari to issue.

Respectfully submitted,

SIGMUND BASS,
BRYAN PURTEET,
Attorneys for Petitioners.

Of Counsel:

WARREN E. MILLER,
Washington, D. C.

Certificate.

Comes now Bryan Purteet, counsel for petitioners in the within cause, and member of the bar of this court, and respectfully states to the Court that the second petition for rehearing herein is filed not for delay, but in good faith and believed by the undersigned counsel for petitioners herein to be meritorious, and that the foregoing motion has been written and filed in good faith and in the honest belief that this motion of petitioners for rehearing should be granted.

Bryan Purteet,
Attorney for Petitioners.

April 24, 1942.